Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lindsey K. Springer,

Petitioner,

v.

HUSTLER MAGAZINE, a foreign corporation, and LFP INC., a foreign corporation

Respondents.

APPENDIX A

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lindsey K. Springer
5147 S. Harvard, Suite 116
Tulsa, Oklahoma, 74135
918-748-5539

20PP

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	Case No.
	)	98-CV-740K(M)
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

NOTIFICATION REGARDING REMAND

Defendants advises the Court that upon examination of service of process, this removal was noticed more than thirty (30) days after Plaintiff's claim became subject to removal and accordingly, remand to state court is appropriate. Plaintiff has no objection to this Notice.

Respectfully Submitted

RHODES, HIERONYMUS, JONES
TUCKER & GABLE, P.L.L.C.

John H. Tucker
Attorney for Defendant LFP, Inc.

October 13, 1998.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	
	)	No. 98 CV-740-K
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is the Defendant's Application for Leave to Re-File Answer. The Defendant mistakenly filed the Answer to the Complaint in the district court of Tulsa County. Now the defendant request this Court grant the Defendant leave to re-file the Answer with this court to clarify the record and avoid all confusion cause by its mistake. Although the Plaintiff objects to this application, the Court finds that the late filing was not due to bad faith, but rather, mistake, inadvertence, or carelessness. See Panis v. Mission Hills Bank, N.A., 60 F.3d 1486(10th Cir. 1995) (holding that the district court had discretion to permit late

filing of answer where defendants could show that delay was caused by excusable neglect). Therefore, the Court finds that the interest of justice would be most adequately served by allowing the Defendant to re-file.

The Defendant's Application for Leave to Re-File Answer # 17 is hereby GRANTED.

Ordered this 27th Day of January, 1999.

Terry C. Kern, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)
	)98-CV-740-K
Plaintiff,	)
	)
Hustler Magazine, et al.,	)
	)
Defendants.	)

ORDER

Before the Court is the Defendant LFP. Inc.'s Motion for Summary Judgment(# 38) pursuant to Fed.R.Civ.P.56.

I. Statement of the Case

The Plaintiff, Lindsey K. Springer, filed this breach of contract action against LFP. Inc., and Hustler Magazine alleging that they made an offer or reward for information regarding the assassination of President John F. Kennedy. On or about February 21, 1978, a publication titled L.A. Free Press contained the following "Reward":

> Because I believe there are many untapped witnesses to the events of the assassination, and many who have knowledge of those who participated in the conspiracy, I am guaranteeing a $ 1,000,000 reward for information leading to the arrest and

conviction of anyone involved in the planning or execution of President Kennedy's murder, or for information which makes it possible for the truth to come out.

-Larry Flynt

The L.A. Free Press makes no reference to Hustler Magazine or LFP, Inc. in this offer in January, 1984, Hustler Magazine published a photocopy of the cover of the L.A. Free Press advertising as follows:

> ACTUAL COVER OF PUBLICATION, THIS A ONE - TIME SPECIAL EDITION, FIRST PUBLISHED ON THE 21ST DAY OF FEBRUARY, 1978, 13 DAYS BEFORE LARRY FLYNT WAS SHOT DURING AN OBSCENITY TRIAL IN LAWRENCEVILLE, GEORGIA.
>
> **COMING SOON TO A NEWSSTAND EVERYWHERE!**

The Defendant contends that the offer to which the Plaintiff refers, if made at all, was made by the L.A. Free Press. Thus, the Plaintiff cannot state a prima facie claim of breach of contract against LFP Inc., and LFP, Inc., is entitled to summary judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material

fact and ...the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249-52(1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Pultry Co., Inc., 971 F.2d 492, 494(19th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment state in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business machines, 48 F.3d 478, 485(10th Cir. 1995).

Discussion

Pursuant to Oklahoma law, to state a claim for breach of contract, a plaintiff must establish:(1) the formation of a contract between plaintiff and defendant; (2) the defendant breached the contract; and (3) the plaintiff suffered damages as a direct result of that breach. The plaintiff carries the burden of establishing an offer, acceptance, and consideration.Horton Ins. Agency v. Robinson,842 P. 2d 397(Okla. Ct.App. 1991)

First, this Court agrees with Defendant's argument that Plaintiff clearly cannot sue Hustler Magazine. Hustler Magazine is a trade name and not a legal entity which can sue or be sued. LFP, Inc. has submitted to this Court a certified copy of the Statement of Ownership, Management, and circulation, filed with the United States Postal Service pursuant to 39 CFR § 111.1. A certified Statement of Ownership is clearly

admissible. Fed.R.Evid. 803(6). Hustler Magazine is not an appropriate Defendant and cannot be sued in this action. Summary judgment as to Hustler Magazine is granted.

As to Defendant LFP, Inc. the Defendant argues that the plaintiff has altogether failed to establish that any offer was made by LFP, Inc. for information on the Kennedy assassination. This Court agrees. The undisputed evidence establishes that the offer upon which the Plaintiff bases his breach of contract claim against LFP, Inc. was made by a publication titled L.A. Free press. That publication makes no reference or mention whatsoever of LFP, Inc. or Hustler Magazine.

Furthermore, Hustler Magazine's publication of the cover of the L.A. Free Press in 1984 does not constitute a republication of the offer. Hustler only published the cover of the L.A. Free Press, and made no reference to or mention of the

alleged offer or reward upon which the plaintiff relies for his breach of contract against LFP, Inc.

This Court finds that Plaintiff has failed to prove a prima facie case of breach of contract against LFP, Inc. To the extent that any offer exists for information on the Kennedy assassination, there is no evidence before the Court to support the argument that the offer was made by LFP, Inc., Summary Judgment in favor of LFP, Inc. is therefore appropriate.

Conclusion

It is the Order of the Court that the Defendant LFP, Inc.'s Motion for Summary Judgment (#38) is hereby GRANTED. All remaining motions are hereby DENIED as moot. This case is terminated.

ORDERED this 4th Day of May, 1999

Terry Kern, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	No. 98-CV-740-K
	)	
Hustler Magazine, et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

This matter came before the Court for consideration of the Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the order filed contemporaneously herewith.

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant LFP, Inc.1 and against Plaintiff Lindsey K. Springer.

Ordered this 4th Day of May, 1999.
Terry C. Kern, Chief
United States District Judge

1. The Court held in the order filed contemporaneously herewith that Hustler Magazine is not a proper Defendant in this action, and cannot be sued. Thus, this Judgment releases any remaining claims against Hustler Magazine as well.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Lindsey K. Springer, Plaintiff, Hustler Magazine, et al., Defendants.	No. 99-5117 D.C. No. 98-CV-740-K-NDO

ORDER AND JUDGMENT

Before **BRORBY, EBEL AND LUCERO**, Circuit Judges.

Plaintiff-appellant Lindsey K. Springer appeals the district court's order and judgment denying his motion for remand and granting the appellee's motion for summary judgment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

Plaintiff, a resident of Oklahoma, filed suit in Oklahoma District Court for Tulsa County against defendant-appellees Hustler Magazine, whose legal status is in dispute, and LFP Inc., a foreign corporation, on August 14, 1998, alleging breach of contract. Specifically, plaintiff alleges that defendants are obligated to pay him a reward

of $ 1,000,000 made for "information leading to the arrest and conviction of anyone involved in the planning or execution of President Kennedy's murder, or for information that allows the truth to come out." I.R., Doc. 38, Exh. A. The L.A. Free Press published the reward, which was offered and "personally guarantee[d]" by Larry Flynt. Id. On September 28, 1998, defendants removed the case to the United States District Court for the Northern District of Oklahoma. Plaintiff then filed a motion seeking remand to state court on the grounds that the removal was untimely. Before the district court ruled on the remand motion, defendants filed a motion for summary judgment. The district court granted the motion for summary judgment and simultaneously denied all other motions as moot.

The sole issue Plaintiff raises in his opening brief on appeal is whether the

District Court improperly denied appellant's motion for remand to state court. "Because removal is an issue of statutory construction, we review a district court's determination of the propriety of removal de novo." Huffman v. Saul Holdings Ltd. Partnership, No. 98-5053, 1999 WL 791587, at *3(10th Cir.Oct.5, 1999)(quotation omitted). Pursuant to 28 U.S.C. § 1446(b), a notice of removal must be filed within thirty days after receipt by plaintiffs of the initial pleadings. Failure to comply with this express statutory requirement is a "defect" that can justify granting a motion for remand pursuant to 28 U.S.C. § 1447(c). See Huffman, 1999 WL 791587 at *4. In order to further the strong interest in "finality, efficiency, and economy"id. at *6(quoting Caterpillar Inc. v. Lewis, 519 U.S. 61, 75(1996)), however, "a defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed

at the time the district court entered judgment." id. at *7. In that situation, remand is justified only "where the judgment reached by the trial court must be reversed on the merits and the case remanded to the trial court for further proceedings." Id. at *7(quotation omitted).

It is undisputed that this suit is between parties with diversity of citizenship and the amount in controversy exceeds $ 75,000, and therefore the district court had subject matter jurisdiction under 28 U.S.C. § 1332 at the time judgment was entered. Accordingly, even though defendants concede that the notice of removal was untimely, the district court's failure to remand to state court is not reversible error unless the district court improperly granted summary judgment for the defendants.1

Plaintiff challenges the merits of the order granting summary judgment for the first time in his reply brief. As a general rule,

appellate courts will not address issues raised for the first time in a reply brief. See Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1277-78(10th Cir. 1994). We will make an exception to this general rule in the present case for two reasons: defendants thoroughly briefed the issue, thereby eliminating concerns that our review of the issue will be unfair to them or insufficiently informed, see Id. at 1278(citing these two factors as being the primary justification for the general rule); and we are required to construe liberally the brief of a pro se appellant. See, e.g. Haines v. Kerner, 404 U.S. 519, 520(1972). We review de novo a grant of summary judgment,

> applying the same legal standard as the district court. We examine the record to determine if any genuine issue of material fact was in dispute; if not we determine if the substantive law was correctly applied. In applying this standard, we view the factual record and inferences therefrom in the light most

> favorable to the nonmoving party. However, to survive summary judgment, the non moving party may not rest upon the allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Summary judgment is appropriate if the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Bullington v. United AirLines, Inc. 186 F. 3d 1301, 1313(10th Cir. 1999)(quotation and citations omitted).

In Oklahoma, a formation of an enforceable contract requires offer, acceptance, and consideration. See National Outdoor Adver. Co. v. Kalkhurst, 418 P. 2d 661, 664(Okla. 1966). The undisputed evidence, taken in the light most favorable to plaintiff, fails to establish a genuine issue as to whether defendants made plaintiff an offer. Plaintiff bases his suit on an alleged offer made and personally guaranteed by Larry Flynt and published in the L.A. Free Press. Neither Flynt nor the L.A. Free Press is a named defendant in this case. Plaintiff seeks to overcome this obstacle by pointing to evidence that Larry Flynt is or was the

editor and publisher of the L.A. Free Press, owner of LFP. Inc.(which publishes Hustler Magazine), and the editor and publisher of Hustler Magazine. Taken as true, this evidence fails to establish that either of the latter two entities can be held liable for breach of contract purportedly entered into by either of the former two entities. Nor does the republication in Hustler Magazine of the cover of the L.A. Free Press Edition containing the alleged offer suggest such liability, since Hustler Magazine did not publish the alleged offer itself. Because we find that the undisputed facts taken in the light most favorable to the plaintiff fail to establish a genuine issue as to whether defendants made him an offer, we do not address whether there is a genuine issue as to Hustler Magazine's capacity to be sued.

The judgment of the district court is AFFIRMED. The matter is dismissed. The

mandate shall issue forthwith.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

October 28, 1999

1. Appellant's argument that 28 U.S.C. §§ 1441 and 1446 are unconstitutional is utterly without merit.

*The case is unanimously ordered submitted without oral argument pursuant to Fed.R.App.P. 34(a)(2) and 10th Cir.R. 34.1(G). This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The Court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3